IN THE

Supreme Court of the United States

OCTOBER TERM—1942

No.....

MITSUBISHI SHOJI KAISHA, LTD., a corporation, GENERAL PETROLEUM CORPORATION OF CALIFORNIA, a corporation, ROYAL INDEMNITY COMPANY, a corporation, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,
Petitioners (Appellants Below),

against

SOCIETE PURFINA MARITIME, a corporation,
Respondent (Appellee Below).

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

Summary of Argument.

The petitioners' first point is directed to the requisition of the *Laurent Meeus* and its effect on Mitsubishi's liability (pp. 22-26). The second point deals with the conditions to which the voyage and charter were subject (pp. 26-28). The freight clause and Purfina's attempt to impose liability on Mitsubishi are discussed in the third point (pp. 28-31). The fourth point is concerned with the "Re-

straints of Princes" clause and the question of frustration (pp. 31-36) while the fifth point deals with Purfina's alleged breach of the charter (pp. 36-38). The sixth point discusses the Belgian Government's interest herein (pp. 39-41) and the last point stresses the general importance of the questions involved (p. 41).

POINT I.

The lower Court erred in its determination as to the nature of the requisition of the *Laurent Meeus* and its effect on Mitsubishi's liability for freight.

The Court below held that the requisition was simply for the Government's direction of the use of the vessel for Purfina's account (R. 750).

The record, we submit, fails to support this finding. Certainly the Belgian Government did not construe the requisition as having any such limited scope. The Belgian Ambassador, in his letter of November 29, 1940, to the Secretary of State, attached as Exhibit B to the first Suggestion of the United States Attorney, referred to the general requisition of all Belgian vessels in May, 1940, and the specific requisition of the *Laurent Meeus* in June (R. 71-74). He stated further that subsequent to May 19, 1940, his Government, for its public use and in aid of the successful prosecution of the war, contracted to charter the *Laurent Meeus* to the British Ministry of Shipping, but that inasmuch as she was not immediately required by the Ministry the Government gave temporary permits to Purfina to operate the vessel (R. 72).

The British Ministry, as soon as the vessel was chartered to it, seems to have exercised control over the vessel equal to that of the Belgian Government. Its represen-

tatives met with those of the B.E.M. to consider whether the present voyage should be approved (Patton, R. 408, 409; Augenthaler, R. 419, 420, 425), and it covered war and marine risks on the vessel's hull and cargo (Lib. Ex. 8, R. 222, 223; Meeus, R. 495; Lib. Ex. 54 [29], R. 507; Lib. Ex. 54 [30], R. 509).

The order of requisition was entered in the ship's log on June 6th (R. 311) and the requisition was acknowledged by Captain Lippens, who thereafter complied fully with the instructions of the Belgian Government (R. 313, 295). The Belgian authorities themselves held the requisition to be in full force from June 6th on (Lib. Ex. 29, R. 507; Lib. Ex. 30, R. 509; Lib. Ex. 54 [40], R. 519, 520; Boel, R. 626, 627).

The *Laurent Meeus,* as already noted, was released from the arrest herein on the ground that she was immune as a public vessel of Belgium (R. 66-77). The Court acted on the Suggestion of the United States Attorney at the instance of the Department of State, according to the procedure outlined by this Court in *Compania Espanola* v. *The Navemar,* 303 U. S. 68, and in *Ex Parte Muir,* 254 U. S. 522. Since the Belgian Ambassador never claimed that the proceedings of November 16th constituted the requisition, but represented that they simply accomplished the cancellation of the trading permits (R. 73) the District Court's release of the ship must, it seems evident, stand as an adjudication that the *Laurent Meeus* was a public vessel of Belgium on and after June 6th.

Unquestionably the requisition was complete on June 6th and the granting of the temporary trading permits to Purfina did not revoke or suspend the requisition but simply made Purfina the licensee of the Belgian Government.

In *The Kabalo,* 67 Lloyd's List L. R. 572, the vessel, which was of Belgian registry, was requisitioned under the same procedure as was followed here and the Court held that she was a public vessel. There was no evidence, as the lower Court mistakenly stated (R. 749) that she was in the actual possession of the Belgian Government.

In *The Cristina* (1938) A. C. 485, 60 Lloyd's List L. R. 147, the vessel was held immune as a public vessel although the Republican Government in Spain claimed no more than *de facto* possession.

See also, *The Arantzazu Mendi* (1939) P. 37, 62 Lloyd's List L. R. 55. The Admiralty Division's opinion is reported in (1938) P. 233, 61 Lloyd's List L. R. 309, and that of the House of Lords in (1939) A. C., 256.

Since the *Laurent Meeus,* unknown to Mitsubishi, was under requisition on September 21, 1940, when the charter was executed, it seems clear that the Belgian Government was, in effect, Purfina's undisclosed principal. And since it was the Government's approval that gave life to the contract, the subsequent withdrawal of the approval destroyed the contract.

There is another question which flows from the requisition and that relates to estoppel. Mitsubishi did not know that the vessel had been requisitioned and had chartered no foreign ships under requisition, as its policy was not to charter such vessels (MacNeil, R. 665, 671). It entered the transaction in good faith, relying on Simpson's representation that the voyage could be made if the Belgian Government approved. The B.E.M. knew that the parties were awaiting its approval and that the charter would be signed when it approved. The approval was given and the charter was executed and then the Government withdrew its approval and cancelled the voyage.

If the Belgian Government had executed the charter, it surely would have been estopped from cancelling it, and if it had sued for this freight it likewise would have been estopped from setting up its own cancellation of the voyage, for the act of approving the voyage was not a political act but an act pertaining to the vessel's management and operation.

An estoppel may be enforced against the United States, a State or a Municipality. *United States* v. *Willamette Val. & C. M. Wagon-Road Co. et al.*, 54 Fed. 807 (C. C. Ore.). And the rule likewise would extend to foreign Governments.

Purfina was nothing but a licensee of the Belgian Government after the requisition. *City of Carbondale* v. *Wade*, 106 Ill. App. 654; *Antlers Athletic Ass'n.* v. *Hartung*, 85 Col. 125; 274 P. 831, 832.

It is of course the law that a person who is in privity with a person who is estopped, is himself bound by the estoppel. *21 Corpus Juris* page 1181, § 184. See also *Jones Store Co.* v. *Dean*, 56 Fed. (2d) 110 (C. C. A. 8); *New York Life Ins. Co.* v. *Brown*, 99 Fed. (2d) 199 (C. C. A. 4); and *Wabash Drilling Co.* v. *Ellis*, 20 S. W. (2d) 1002, 1004 (Ky.).

That Courts of Admiralty have the power to enforce an estoppel is well settled. *O'Brien* v. *Miller*, 168 U. S. 287; *Higgins et al.* v. *Anglo-Algerian S. S. Co.*, 248 Fed. 386 (C. C. A. 2), and *Olivier Straw Goods Corporation* v. *Osaka Shosen Kaisha*, 27 Fed. (2d) 129 (C. C. A. 2).

The elements of a perfect estoppel against the Belgian Government exist. Since this is so, Purfina, as the Government's licensee and in privity with it, is, it would certainly seem, estopped from raising the "Restraints of Princes" clause of the charter as an excuse for the non-performance of its contract.

The importance of the questions which arise from the requisition of the *Laurent Meeus* make it desirable, we submit, that this Court consider and settle them finally.

POINT II.

The Court below erred in failing to hold that the charter was subject to conditions precedent, one express and one implied, in the form of the Belgian Government's approval, and that when the approval was withdrawn the contract was dissolved *ab initio.*

The parties stipulated that the undertaking was subject to the approval of the Belgian Government (Lib. Ex. 53 [2], R. 402-405). And what they contemplated was not a mere permission to execute the charter, which would have been of no use alone, but an approval of the *voyage.* Simpson's letters of August 27th and 28th to Mitsubishi make this clear (Lib. Ex. 53 [1], R. 398-400; Lib. Ex. 53 [2], R. 402-405). Moreover, Simpson, when cabling London for the approval, requested the Government's approval of the "trip" (R. 406). When the approval came through it was for a "voyage" to Japan (Lib. Ex. 54 [45], R. 524, 525). All this documentary evidence was offered by Purfina's proctors themselves.

The condition was not incorporated in the charter itself but it was nevertheless a term of the contract for it was contained in a contemporaneous writing, namely, Simpson's August 28th letter, which was not in contradiction of the terms of the contract (*Wigmore on Evidence,* 3rd Ed., Vol. IX, §§ 2431, 2430).

Obviously the parties contemplated that the approval, once given, must continue, as their undertaking was based upon it. We therefore cannot follow the lower Court in

its holding that the agreement on this condition was not an agreement that if the condition failed through the withdrawal of the approval the charter was to be avoided or cancelled (R. 754). The "Restraints of Princes" clause, we submit, must be considered as subject to the overriding condition that the Belgian Government had to approve the venture and continue its approval.

There was also an implied condition in the charter that the Belgian Government's approval of the voyage would not be withdrawn, and that if it were withdrawn the withdrawal should operate as a dissolution of the charter.

In *Texas Co.* v. *Hogarth Shipping Co.*, 256 U. S. 619, a suit was brought to recover damages for an alleged breach of a voyage charter party. The steamer *Baron Ogilvy* was named as the ship to be chartered and the intended voyage was between ports in Texas and South Africa. While the vessel was in British waters she was requisitioned by the British Government and consequently became unavailable for performance of the charter.

This Court held (p. 629) that performance of the contract had become impossible through a supervening act of State and that the contract was therefore dissolved pursuant to a condition implied in it that if "before the time for performance and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it."

In *The Tornado,* 108 U. S. 342 (2 Sup. Ct. Rep. 746), a suit in admiralty was brought against the cargo to recover freight. While the vessel was moored at her wharf in the port of shipment a fire broke out aboard her, and during the course of efforts to put out the fire, she sank and was thus rendered unseaworthy and incapable of earning

freight. This Court held that the owner had no claim for freight, its decision following the same general lines of reasoning as those in the *Hogarth* case.

The lower Court (R. 754, 755) thought that the above cases were distinguishable from the present one because there the shipping documents contained no clause that the freight should be deemed earned, vessel or goods lost or not lost. We cannot see how this is a valid ground of distinction, for if the contract is dissolved by operation of an implied condition, the freight clause, as a part of the contract, falls with it, leaving the carrier with nothing on which to base a claim for freight. Neither is it perceived how the fact that the *Laurent Meeus* loaded the cargo alters the situation. The performance contemplated by the parties was the *carriage* of the cargo. The loading was simply a preliminary operation.

Because of the lower Court's seeming misinterpretation of the "Restraints of Princes" clause in the face of the express condition precedent and because of the probable conflict between its decision and those of this Court in the *Hogarth* and *The Tornado* cases, *supra,* we respectfully submit that the decision should be reviewed by this Court.

POINT III.

The lower Court erred in holding that Mitsubishi became liable for the freight either before or after receipt of the telegraphic notice of the signing of the bills of lading.

The Court below, as we construe its opinion, approved the District Court's holding that the freight was due and earned when the cargo was loaded (R. 746, 747). It then

went on to hold that the freight was payable on October 11th, when Purfina telegraphed Mitsubishi that bills of lading had been signed (R. 764).

We can see no justification for holding that this freight was due or earned before it became payable under the terms of the freight clause, for the clause does not so provide. It would have been a simple matter for the drafter of the clause to have provided that freight should be due, or be deemed earned, when the cargo was loaded or the bills of lading signed. But there is no such provision. The clause is in derogation of the usual rule that freight, in the absence of a contrary agreement, is due and payable only on delivery of the cargo at destination, and therefore it must be strictly construed against the carrier. Under the clause as worded the earliest possible time when the freight could be considered due or earned, we submit, is the time fixed for its payment, namely, when the charterer received telegraphic advice that the bills of lading had been signed. Any other holding would, it seems to us, involve the remaking of the clause.

The importance of the point is obvious, for if the freight was due or earned when the cargo was loaded or the bills of lading signed, an obligation to pay (depending upon how the other angles of the case are disposed of) might have arisen before the stop order was received on October 2nd. On the other hand, if the freight was not due or earned on October 2nd, no obligation to pay it assuredly ever arose, because of the intervention of the suspension order between loading and Purfina's dispatch of the telegraphic notice on October 11th.

The District Court apparently was led into this error through a misconception of the case of *National Steam Navigation Co. Limited of Greece* v. *International Paper*

Co., 241 Fed. 861 (C. C. A. 2). There, however, the bills of lading, unlike the present charter, provided that freight was due when the goods were received on the ship and also that the freight was due in full on signing of the bill of lading. The Court, seeking to harmonize these clauses, held that the bill of lading must be construed as meaning that the freight was due when the cargo was loaded, and was payable when the bill of lading was signed. No such situation is presented here.

Now, as to the telegraphic notice. On October 11th, when Purfina at last—and then only on the suggestion of its counsel—telegraphed Mitsubishi that the bills of lading had been signed, it was unable to carry out its contract. Although it had failed to sail the vessel when the cargo was loaded and on October 11th was disabled by the October 2nd stop order from going further, it tried, by the device of telegraphing Mitsubishi, to make the latter liable for the charter hire. We cannot believe that the law will sanction any such proceeding as this.

The cases on the subject are not numerous, but there are two which are directly in point. They are *Smith Hill & Co.* v. *Pyman Bell & Co.* (1891) 1 Q. B. 742, and *National Steam Navigation Co. Limited of Greece* v. *International Paper Co.*, 241 Fed. 861 (C. C. A. 2).

In the first case one-third freight was to be paid in advance "if required." The vessel was lost directly after sailing and the ship-owner then demanded the freight. The Court held that the demand was a condition precedent to the obligation to pay and that no freight was due because the demand, coming after the vessel's loss, was too late.

In the second case the Court, although it spoke by way of dictum, made it plain (p. 863) that if the contract had been so phrased as to make freight due and payable on

tender of the bill of lading, no liability for freight would accrue where the bill of lading was tendered to the shipper after the destruction of the vessel and her cargo in a fire.

From Mitsubishi's standpoint the *Laurent Meeus,* which was unavailable for the performance of the charter, was no better than a ship destroyed.

The Court below erred, we submit, not only in its construction of the freight clause but in its holding that Purfina could make Mitsubishi liable for the payment of the freight by the expedient of sending Mitsubishi the telegram referred to. Because of the importance of these questions, particularly in their relation to the frustration question, we respectfully ask the Court to pass upon them.

POINT IV.

The lower Court erred in holding that Purfina was excused by the "Restraints of Princes" clause from performing the contract but that Mitsubishi was nevertheless required to pay the freight.

Our opponents contended, and were sustained by the lower Courts, that while the venture was frustrated by Governmental acts, and Purfina therefore was excused by the "Restraints of Princes" clause from performing, Mitsubishi was still required to pay the freight because its obligation to do so matured before the venture was frustrated. Thus there are presented the questions as to what the frustration consisted of and when it occurred and whether any obligation to pay freight accrued against Mitsubishi before the frustration took place.

We submit that on the view which both lower Courts took of the events between October 2nd and November 16th

the voyage was frustrated by the whole series of Governmental acts in combination; that the Government's cancellation of the voyage and its taking physical possession of the ship were but the culmination of an inexorable chain of events.

The situation in brief was this: Japan adhered to the Axis after the charter was signed, and Belgium—and Great Britain too—was apprehensive of the consequences. So the vessel's sailing was suspended on October 2nd. When approval was given on October 15th it was on condition that the ship proceed to Singapore after discharging the oil at Yokohama and this caused the crew to rebel because the change in itinerary violated their articles. While the master was trying to clear up the crew situation a second suspension order was issued, on October 22nd, followed by the cancellation of the voyage on November 5th.

The lower Courts found no hiatus in the chain of events, and ascribed everything that occurred from beginning to end to Governmental interference. On this basis there was a frustration right from the start, for the vessel was continuously prevented from making the voyage from the very moment the first suspension order was received on October 2nd.

If the frustration dated from October 2nd, Purfina's "matured obligation" theory falls for there was nothing in the freight clause to make freight due or earned before the telegraphic notice was sent, as shown in our third point.

A case closely resembling the present one is that of *Admiral Shipping Co.* v. *Weidner, Hopkins & Co.,* 86 L. J. K. B. 336, where the charters stipulated for the payment of hire half monthly in advance. After the outbreak of war between Russia and Germany, it was impossible, be-

cause of the orders of the Russian Government, for the vessel to leave the Baltic for England. In a suit for hire, the Court of Appeal held that the delay occasioned was of such indefinite duration as to frustrate the contemplated commercial adventure entirely, that the contract was therefore terminated and that no hire was due. Here the orders of the Belgian Government, beginning on October 2nd, produced an indefinite delay in the sailing of the *Laurent Meeus,* long before the voyage was formally cancelled.

The Court below relied on this Court's decisions in *The Allanwilde, The Gracie D. Chambers, The Bris,* and *The Malcolm Baxter, Jr.,* all of which involved prepaid freight clauses, to justify its holding that Mitsubishi was liable for this freight (R. 760-763). We shall not repeat their facts as they are set forth in the lower Court's opinion. Perhaps one or two clarifications might be added, however. In *The Gracie D. Chambers,* the Governmental embargo order was promulgated before the freight was paid but clearance was refused after payment, which was made voluntarily and without knowledge of the embargo. In *The Bris,* the shipment was made, the bill of lading was issued, and the freight was paid before the issuance of the Presidential proclamation requiring shippers to procure export licenses for varnish destined for Gothenburg, which license the shipper later was unable to secure.

There are several important features which, it is believed, distinguish the above cases, collectively and individually, from this one.

1. There, except possibly in the case of *The Gracie D. Chambers,* the obligation to pay freight had accrued and the freight had been paid before performance of the contract by the carrier was rendered impossible. Here, if

the frustration commenced on October 2nd, the freight had not become due because the freight clause did not so provide. If the frustration did not occur until November 5th, Mitsubishi still was not liable, for Purfina, we submit, could not make Mitsubishi liable for the payment of freight by sending it a telegram after the sailing had been blocked by the Belgian Government.

2. In *The Allanwilde* and *The Malcolm Baxter, Jr.*, the voyages had commenced before the Governmental embargo went into effect.

3. In *The Bris*, the absence of a United States license for the shipper's goods made it impossible for the carrier to transport them.

4. The case of *The Malcolm Baxter, Jr.* stands in a somewhat different category because it was a deviation case. It was the master's duty to seek a port of refuge under the established maritime rule, and in doing so he was not to be penalized by having the contract of carriage displaced. *Kish* v. *Taylor* (1912), A. C. 604.

5. Here the vessel, when the charter was signed, was under requisition by the Government which frustrated the voyage. Purfina, of course, knew this but made no disclosure to Mitsubishi. This existing restraint was not within the "Restraints of Princes" clause. *Rotterdamsche Lloyd* v. *Gosho Co.*, 298 Fed. 443, 445 (C. C. A. 9).

6. In those cases the United States Government did not, as was the case here, first approve the venture and then withdraw its approval after the party whose liability for freight was asserted had executed the contract on the strength of the Government's approval.

Purfina's case, in the final analysis, must be based on *The Gracie D. Chambers* decision, for that is the only one among the four in which the vessel did not break ground. If that case is held not distinguishable from the one at bar—and we believe that it is—then, we venture to suggest, its doctrine should be reviewed and the decision overruled, if necessary. When the case was before the Circuit Court of Appeals, Judge LEARNED HAND wrote a strong dissenting opinion (253 Fed. 182, 185, 186) in which he pointed out the injustice of allowing the carrier to keep the freight. He thought there was a marked distinction insofar as the ship-owner's rights were concerned, between a case where the ship had not broken ground and one where she had.

The doctrine of *The Gracie D. Chambers,* and, for that matter, the rule applied in all these four cases, with the possible exception of *The Malcolm Baxter, Jr.,* appears irreconcilable with the rule as to dissolution of contracts through frustration, as stated in *Texas Co.* v. *Hogarth Shipping Co., supra.* It seems paradoxical that the contract can be dissolved and the ship-owner still be entitled to the freight, for there is manifestly a total failure of consideration. The dissolution doctrine should be followed through to its logical conclusion, which, it seems to us, is that the dissolution of a shipping contract through a frustration carries with it the prepaid freight clause, if it contains one. It is incorrect, we believe, to say that such a dissolution does not wipe out so-called "accrued obligations." It is just as logical to say that a shipper has an "accrued right" to have his goods carried as to say that the carrier has an "accrued right" to freight under the prepaid freight clause. Plainly no "rights" of any kind should survive a dissolution under an implied condition, if the *Hogarth* case states the correct rule, as we believe it does.

Because of the importance of the questions which are discussed under this point, we respectfully ask this Court to issue the writ prayed for to the end that they may be passed upon and definitely settled.

POINT V.

The lower Court erred in holding that Purfina did not breach the charter.

If the contract was dissolved through failure of the condition precedent this point of course would have no standing, for in such event Mitsubishi's cross-libel would fall equally with Purfina's claim for freight.

As we have seen, the loading of the cargo was completed at 10:10 A. M. on October 2nd. Directly afterward the master signed the bills of lading. The departure permit from the Merchant Ship Control was received on October 1st, and although the vessel had most of October 2nd in which to sail before the Belgian Government's stop order was received clearance was not applied for. The vessel failed to sail during the day of October 2nd for two reasons: First, her engines required repairs and overhauling, and, second, she had an insufficient crew.

The work on the engines, according to the chief engineer, required from three to four days. Trouble was experienced with the engine valves before the ship arrived at San Pedro, and it was known that the work would have to be done (Van Elsen, R. 643, 645).

According to the well-known and uniform custom at San Pedro tankers had all preliminaries completed before completion of loading and left almost directly thereafter. Repairs always preceded loading (Green, R. 198-203; Wick-

ersham, R. 718-721; Bartlett, R. 709-712). Notwithstanding that it was known beforehand that the engine repairs and alterations were necessary, Purfina loaded the cargo first and then proceeded with repairs, instead of reversing the procedure in accordance with the usual custom. Had the customary procedure been followed, the oil would not have been on the vessel when the stop order was received on October 2nd. The custom of the port was by implication incorporated in the charter. *25 Corpus Juris Secundum,* § 21, p. 109; *Lillard* v. *Kentucky Distilleries & Warehouse Co.*, 134 Fed. 168 (C. C. A. 6); *Bullock and others* v. *Finley,* 28 Fed. 514 (C. C. Ohio); and *The Queen of the East,* 12 Fed. 165 (C. C. E. D. La.).

The lower Court simply held that the custom did not apply to a single Asiatic voyage such as this one (R. 755, 756). The record contains nothing, however, which lends any support to this finding.

The Court also cited clause 22 of the charter, which gave Mitsubishi the option of cancelling the charter (R. 18) if the ship was not ready to load by October 15, 1940, and held in substance that the charter had not been breached because Purfina had until October 15th in which to load and make repairs (R. 756). This view appears clearly untenable because the vessel did load before October 15th, thus making the cancellation clause inoperative.

The second reason for the vessel's failure to sail during the day of October 2nd was the lack of a full crew. This was conceded by the ship's agents (R. 477, 478). On the vessel's arrival the personnel was greatly reduced through discharge, illness and desertion (Lib. Ex. 46, R. 323, 324). Seven Scandinavians were signed on in the afternoon of October 2nd, but two officers and the electrician and carpenter were not replaced (R. 338-340).

The *Laurent Meeus* was unseaworthy both with respect to her engines and her crew on October 2nd, and because she was unable to sail for these reasons, Purfina, we submit, broke the charter.

In addition to being liable to Mitsubishi for any damages resulting from the breach, Purfina also thereby forfeited any claim for freight. *The Great Indian Peninsula Railway Company* v. *Turnbull,* 53 L. T. R. 325; *Cosmopolitan Shipping Company, Inc.* v. *Hatton & Cookson, Ltd.,* 34 Lloyd's List L. R., 231; *Smith Hill & Co.* v. *Pyman Bell & Co.* (1891), 1 Q. B. 742; *Weir & Co.* v. *Girvin & Co.* (1899), 1 Q. B. 193; affirmed (1900), 1 Q. B. 45.

The lower Court held (R. 763) that even if Purfina had failed in its duty to make the vessel seaworthy for the voyage, the burden fell upon Mitsubishi to show that such failure had caused the loss of the voyage, citing *The Malcolm Baxter, Jr., supra.*

We believe that the Court erred in holding that the *Baxter* case, involving a deviation with special circumstances, is applicable here. In deviation cases like *The Malcolm Baxter, Jr.,* the Courts are dealing with a special situation, where a vessel at sea, whatever the cause, finds herself in a perilous position. Under such circumstances it is held to be the duty of the master to seek a port of refuge for the purpose of protecting life and property and if he does so he is not penalized by having the contract of carriage displaced.

We submit that the question as to whether Purfina breached the charter, particularly in the light of this Court's decision in *The Malcolm Baxter, Jr., supra,* and its asserted applicability here, is of sufficient importance and general interest to be reviewed by this Court.

POINT VI.

The Belgian Government, which cancelled the voyage, has an interest in this litigation, arising from its sovereign power to expropriate the freight sued for, which, if collected, it will receive from Purfina. The lower Court, apart from anything else, erred in granting Purfina a decree under these circumstances.

Although Meeus and Lippens wanted the ship's regular agents to hold her freights as trustee, the B. E. M. refused. (Meeus, R. 545; Lippens, R. 351; Lib. Ex. 54 (30) R. 509) The B. E. M. insisted that all the freights of the vessel must be paid over to it to hold as an alleged trustee for Purfina. When there was a delay in turning over the July freights it issued a peremptory order to Meeus to surrender them forthwith at the risk of having other measures taken (Lib. Ex. 54 (37), R. 517). Arrangements were finally made for the transfer of those freights (Lib. Exs. 54 (39) and 54 (38), R. 518, 519; also Exs. 54 (40) and 54 (41), R. 519-521).

The B. E. M. refused even to consider the application for its approval of the present voyage until assured that it would get the vessel's July freight and when, after a delay of almost a month, it finally gave its approval it was on the condition that the freight in dispute also should be paid over to it (Augenthaler, R. 419, 420; Lib. Ex. 54 (53), translated, R. 511, 512; Lib. Exs. 54 (45) and 54 (46), translated, R. 524-526; Lib. Ex. 54 (51), translated, R. 535).

Captain Rene Boel, head of the B. E. M., said that the B. E. M. was holding the freight moneys for the account of Purfina. But he could point to nothing but a credit entry in the books of the B. E. M. There was neither a trust account nor a special account. The freights seemingly were

intermingled with the other funds of the B. E. M. Boel said that the moneys were paid to the Belgian Embassy in Washington and credited to the B. E. M. in London; that the Belgian Embassy had the money for account of the B. E. M. in London but had not transferred the money to London (R. 623, 624). The Belgian Ambassador declined our invitation to appear and testify in this matter (R. 637, 638).

So far as the record discloses, the Belgian Government was simply a debtor of Purfina with respect to the *Laurent Meeus* freights, and while the Government might have to account to Purfina on the termination of the war (although this does not necessarily follow), there is no reason why the Government cannot now expropriate the funds and use them for whatever purpose it desires. In fact the very peremptoriness of the Government's demands for the freights justifies the suspicion that it was not so much interested in holding them for Purfina as in building up dollar exchange in the United States.

Although the Belgian Government is not a formal party herein, a Court of Admiralty can look beyond the pleadings and see where the real interest lies, and take appropriate action, if necessary. *Benedict on Admiralty,* 6th Edition, Vol. I, § 71, pp. 148, 150. *United States* v. *Cornell Steamboat Co.,* 202 U. S. 184, 194; *Higgins et al.* v. *Anglo Algerian S. S. Co.,* 248 Fed. 386, 389 (C. C. A. 2).

The lower Court held that the "trusteeship" of the vessel's net earnings "after Purfina had discharged its obligations to Mitsubishi is not a matter of the latter's concern" (R. 753). We must respectfully disagree as to this. We think that it is very much Mitsubishi's concern. In short, it seems to us that it would be unconscionable to make it possible for the Belgian Government, which approved the voyage and then cancelled it, to reap even an indirect

benefit out of the freight, if recovered by Purfina, and we strongly feel that the lower Court erred in making this possible. We submit that this aspect of the case is of sufficient importance to warrant review by this Court in the event of a decision adverse to Mitsubishi on the other points involved.

POINT VII.

The questions presented are of great importance and are of general interest to the shipping world and to the public at large.

This case, as we have endeavored to make clear, involves many questions of great importance to ship-owners, charterers, underwriters, shippers and the public at large. The requisition of the *Laurent Meeus* and the subsequent issuance of trading permits to Purfina present most interesting questions as to their effect upon the rights of the parties herein. Then there is the question as to what effect the stipulation for the Government's approval of the voyage and the subsequent withdrawal of the approval had on Mitsubishi's alleged liability for freight. Also, the circumstances involved in the frustration, the peculiar wording of the freight clause, and the attempt of Purfina to impose liability on Mitsubishi under the clause after the voyage was blocked, present questions of unusual interest and importance. Moreover, it is advisable, we submit, that a final determination be made as to the applicability, if any, of this Court's decisions in *The Allanwilde* and companion cases to a situation like this, and that a complete review of the question of frustration in its relation to the prepaid freight clause should be made in the particular light of the other decisions of this Court as to the dissolution of contracts through frustration.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Ninth Circuit should be granted.

Dated, March 1, 1943.

Respectfully submitted,

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